

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS  
EASTERN DIVISION  
CASE NO. 10-11893

*ELECTRONICALLY FILED*

JOSEPH S. PROVANZANO

PLAINTIFF

v.

**MEMORANDUM IN SUPPORT OF**  
**MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION**  
**AND FOR FAILURE TO STATE A CLAIM**

BRIDGET M. PARKER,  
INDIVIDUALLY AND DOING BUSINESS AS  
PARKER VIEW FARM,  
PARKER VIEW FARM, INC.,  
ROBERT M. TURNER,  
INDIVIDUALLY AND DOING BUSINESS AS  
LM TURNER STABLES, AND  
LM TURNER STABLES, INC.,

DEFENDANTS

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**I. INTRODUCTION**

Joseph S. Provanzano (“Plaintiff”) commenced this diversity action against Defendants Bridget M. Parker, Parker View Farms, Inc., Robert M. Turner and LM Turner Stable (“Defendants”) on or about October 21, 2010, seeking relief based on Massachusetts General Laws Chapter 93A.

As shown below, Plaintiff has failed to allege and cannot establish that Defendants have “substantial and continuous” contacts with Massachusetts sufficient to confer general jurisdiction over them. Moreover, Plaintiff has failed to allege facts sufficient to subject Defendants to specific jurisdiction under Massachusetts General Laws Chapter 223A, Sec. 3(a), the

Massachusetts long-arm statute. Consequently, this case was not properly brought in Massachusetts and should be dismissed for lack of personal jurisdiction.

Plaintiff will suffer no prejudice by dismissal of this case because the same issues presented here are currently pending in a lawsuit in the Circuit Court in and for the County of Woodford, Commonwealth of Kentucky, Case No. 10-CI-00517 (the “Kentucky Action”). A copy of the Kentucky Action is attached hereto as Exhibit 1. The Kentucky Action was brought by Defendants against Plaintiff approximately two weeks before Plaintiff filed this case (and two weeks after Plaintiff’s counsel was provided with a courtesy copy of the Complaint filed in the Kentucky Action). In the Kentucky Action, Defendants: 1) allege that Plaintiff committed business defamation, 2) assert that Plaintiff breached a verbal contract with Parker View, and 3) seek declaratory judgment on behalf of Parker View and Turner. Additionally, Plaintiff has failed to state claim based on Massachusetts General Laws Chapter 93A. The transaction at the center of this action is not covered by this consumer protection law.

## II. FACTUAL AND PROCEDURAL BACKGROUND <sup>1</sup>

In 2006, Plaintiff’s horse, Mild Emotion, developed an eye injury while being trained by Defendant Turner. Complaint ¶ 12. In an effort to allow the horse to recuperate and be close to an eye surgeon in Kentucky, Plaintiff sent the horse from New Hampshire to Parker View Farm in Kentucky. *Id.* at ¶¶ 33-34. After being transferred to Kentucky, Plaintiff’s horse was bred during three successive years and produced a foal each year. *Id.* at ¶¶ 51, 58, 67 & 70. All four horses were shipped back to New Hampshire during the summer of 2010. *Id.* at ¶ 65.

Plaintiff alleges in his Complaint that he never authorized Defendants to breed Mild Emotion during the three plus years that she was boarded at Parker View. *Id.* at ¶ 47. Plaintiff alleges that he agreed to pay only \$350.00 per month to board and otherwise care for his horse

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<sup>1</sup> For purposes of this Motion, Defendants accept the following factual allegations alleged by Plaintiff as true.

and that Defendants charged him more than that amount. *Id.* at ¶74. Plaintiff also alleges that Defendants did not return certain equipment belonging to Plaintiff. *Id.* at ¶31. Each of these actions, Plaintiff alleges, violates Massachusetts General Laws, Chapter 93A. *Id.* at ¶¶74-79.

However, before Plaintiff filed this action, Defendants filed an action in Woodford County Circuit Court in Versailles, Kentucky on October 8, 2010 asserting claims for breach of contract and defamation and seeking declaratory relief in their verified complaint. The undersigned served counsel for Plaintiff with a courtesy copy of the Complaint that same day. Plaintiff has not yet been served pursuant to Kentucky's long-arm statute and he is believed to be avoiding service. Plaintiff then filed the instant action in Massachusetts Superior Court on October 21, 2010 alleging that Defendants violated Massachusetts General Laws Chapter 93A. Defendants removed the action to this Court on November 4, 2010 based on diversity.

### III. ARGUMENT

#### A. The First-to-File Rule dictates that this case should proceed in Kentucky.

Where two suits are filed in sister courts, the first-filed action is generally preferred where "prosecution of both would entail duplicative litigation and a waste of judicial resources." *S. W. Industries, Inc. v. Aetna Casualty and Surety Co.*, 653 F. Supp. 631, 634 (D.R.I. 1987) citing *Small v. Wageman*, 291 F.2d 734, 736 (1st Cir. 1961). This is "not a per se rule, but rather a policy governed by equitable considerations: 'the forum where an action is first filed is given priority over subsequent actions, unless there is a showing of balance of convenience in favor of the second action, or there are special circumstances which justify giving priority to the second.'" *S. W. Industries*, 653 F. Supp. at 634 (quoting *Gemco Latinoamerica, Inc. v. Seiko Time Corp.*, 623 F. Supp. 912, 916 (D.P.R. 1985)).

On October 8, 2010 Defendants filed a suit in Woodford County, Kentucky based on the same facts that form the basis of the current lawsuit. *See* Complaint attached hereto as Exhibit 1. Less than two weeks later, Plaintiff filed the instant action in Massachusetts Superior Court. Both actions ask the respective courts to determine whether Mass. Gen. Laws, chapter 93A has been violated by Defendants, while the Kentucky Action also asserts a business defamation claim against Plaintiff as well as a breach of contract claim. Thus, it is clear that allowing both suits to continue will waste judicial resources and be entirely duplicative.

All of the acts that allegedly form the basis of Plaintiff's claim occurred in Woodford County, Kentucky. Plaintiff sent Mild Emotion to Woodford County in 2006 and allowed her to remain there for more than three years. Each of the foals born to Mild Emotion were born in Woodford County and all matings took place in or near Woodford County. Additionally, Plaintiff shipped the horses from New Hampshire to Kentucky and when they were moved off Parker View they were shipped back to New Hampshire. Thus, Massachusetts has no connection to this suit other than the fact that Plaintiff lives there. Woodford County is the proper venue for the claims the parties have made against one another. This action should be dismissed or stayed because of the first-to-file rule.

**B. This Court does not have personal jurisdiction over Defendants.**

**1. The Massachusetts Long-Arm Statute and The Due Process Clause**

In a diversity action, a federal court examining whether personal jurisdiction exists must look to the forum state's long-arm statute and construe that statute within the bounds of the Due Process Clause. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 204 (1st Cir. 1994).

**a. Massachusetts Long-Arm Statute**

Massachusetts' long-arm statute, codified at Mass. Gen. Laws, ch. 223A, § 3(a), provides in relevant part:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's

(a) transacting any business in this commonwealth;

(b) contracting to supply services or things in this commonwealth;

(c) causing tortious injury by an actor or omission in this commonwealth;

(d) causing tortious injury in this commonwealth by an actor or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;

### **b. Merger of Massachusetts Long-Arm Statute and the Due Process Clause**

A valid assertion of personal jurisdiction must satisfy both the state long-arm statute and constitutional due process. In situations where a state's long-arm statute reaches as far as the limits of the Due Process Clause of the United States Constitution, as amended, the two inquiries are merged and courts need only determine whether the assertion of personal jurisdiction violates constitutional due process. *See Adelson v. Hananel*, 510 F.3d 43, 49 (1st Cir. 2007).

### **2. Plaintiff cannot establish personal jurisdiction over Defendants in Massachusetts.**

The Due Process Clause permits the exercise of both general and specific jurisdiction. General jurisdiction exists when a defendant has "continuous and systematic contacts" with the forum state sufficient to justify the state's exercise of judicial power with respect to any and all claims against the defendant. *Glatter v. Eli Lilly & Co.*, 744 F.2d 213, 215 (1st Cir. 1984). Specific jurisdiction, in contrast, subjects the defendant to suit in the forum state only on a claim that "arises out of or is related to" a defendant's contacts with the forum. *Id.*

In both instances, the exercise of jurisdiction is limited by the Due Process Clause. *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 nn.8-9 (1984). The cornerstone of the relevant due process inquiry is an analysis of the defendant's contacts with the

selected forum, with the requirement of certain “minimum contact s” with the forum “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

**a. There is no basis for General Jurisdiction.**

Defendants do not have any “continuous and systematic contacts” with Massachusetts that would be sufficient to justify the state’s exercise of general jurisdiction over them. It is undisputed that Defendants are foreign individuals and entities who are residents of, or have their principal places of business in, Kentucky and New Hampshire; no Defendant is a resident of Massachusetts and neither Parker View nor LMTurner Stable has offices or physical facilities in the Commonwealth. ( See Affidavit of Bridget M. Parker, attached hereto as Exhibit 2, at ¶¶ 3; and Affidavit of Robert Turner, attached hereto as Exhibit 3, at ¶ 3). Defendants own no real or personal property in Massachusetts. (Parker Aff. at ¶ 3; Turner Aff. at ¶ 3). Until this lawsuit, Defendants had never been sued in the courts of Massachusetts, and they have never initiated a lawsuit in this Commonwealth. (Parker Aff. at ¶ 7; Turner Aff. at ¶ 5). Further, Defendants do not directly advertise in Massachusetts and do not regularly provide services within the state. (Parker Aff. at ¶¶ 4-8; Turner Aff. at ¶¶ 2-4). These contacts fall far below the standard of “continuous and systematic contacts” for imposing general jurisdiction over Defendants.

**b. Specific Jurisdiction does not exist.**

To determine whether specific personal jurisdiction exists, the First Circuit has adopted a three-pronged analysis: First, the defendant must purposefully avail itself of the privilege of acting in the forum state or causing consequences in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences must have a substantial enough connection with the forum state to make the

exercise of jurisdiction over the defendant reasonable. *United Elec., Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080 (1st Cir. 1992). Even if these criteria are satisfied, jurisdiction is appropriate only if “maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *International Shoe Co.*, 326 U.S. at 316.

**i. Defendants did not purposefully avail themselves of acting in the Commonwealth of Massachusetts.**

The “purposeful availment” requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of “random,” “fortuitous,” or “attenuated contacts.” *Burger King v. Rudzewicz*, 471 U.S. 462, 475 (1985). The test as to whether a party has “transacted business” under Massachusetts law is “designed to identify deliberate, as distinguished from fortuitous, contacts with the forum by the nonresident party, with a view to determining whether the possible need to invoke the benefits and protections of the forum’s laws was reasonably foreseeable.” *Lyle Richards Int’l v. Ashworth, Inc.*, 132 F.3d 111, 113 (1st Cir. 1997) (internal quotations and citations omitted). One of the critical issues in making this determination is whether the foreign party “initiated or solicited the business transaction in Massachusetts.” *Id.* Clearly, such is not the case here.

Mild Emotion was shipped from New Hampshire to Kentucky solely on the initiation of Plaintiff. (Parker Aff. at ¶ 9; Turner Aff. at ¶ 8). No Defendant met with Plaintiff in Massachusetts to discuss shipping the horse to Parker View. (Parker Aff. at ¶ 10; Turner Aff. at ¶ 10). Plaintiff made the decision to ship the horse to Kentucky to have her evaluated by a specialized equine eye surgeon who could evaluate the condition of her eye. (Turner Aff. at ¶ 8). To this day, Bridget Parker has never met Plaintiff personally. (Parker Aff. at ¶ 10). None of the Defendants did anything to solicit the business of Plaintiff prior to Plaintiff contacting them. (Parker Aff. at ¶ 13; Turner Aff. at ¶ 9). While Defendant Turner may have suggested Parker

View as an appropriate location to board Mild Emotion in Kentucky after being asked by Plaintiff (*Id.*), such a suggestion does not then subject Defendants to this court's jurisdiction. And it certainly does not subject Parker View to jurisdiction in Massachusetts.

**ii. No cause of action arises from Defendants' activities, if any, in Massachusetts.**

Because Defendants did not conduct any activities in Massachusetts, Plaintiff cannot establish the second prong of the test: the cause of action must have arisen from defendant's activities in the forum state. It is undisputed that prior to Mild Emotion being shipped to Kentucky, she was located in New Hampshire. Additionally, when the horses were removed from Kentucky they returned to New Hampshire, not Massachusetts.

The crux of Plaintiff's claim is that his horse was bred multiple times without his consent causing his bills to be far in excess of what he had allegedly agreed upon. This conduct, to the extent it occurred, took place entirely in Kentucky. The entire transaction was initiated by Plaintiff to occur outside of Massachusetts and the services were all provided outside of the Commonwealth.

**iii. Defendants' connections with Massachusetts are insufficient to satisfy the "substantial connection" requirement.**

Plaintiff cannot establish the third requirement of "a substantial enough connection with the forum state" to make the exercise of jurisdiction reasonable. The determination of reasonableness depends on an evaluation of several factors: (1) the burden on the defendant of litigating in the forum, (2) the interest of the forum state, (3) the plaintiff's interest in obtaining convenient and effective relief, and (4) the shared interest of the several states in furthering fundamental substantial social policies. *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). The analysis of these factors demonstrates that this action should be dismissed.



The burden for Defendants to litigate in the State of Massachusetts is significant. Massachusetts has very little interest in the action because the transactions were not completed or performed within the State. Plaintiff is able to assert his same claims in the Kentucky Action to obtain relief. Kentucky clearly has an interest in regulating the kinds of business practices that are acceptable in the State, especially equine business.

In sum, Plaintiff has not and cannot meet its burden of demonstrating that Defendants have sufficient connections with Massachusetts to satisfy the “substantial connections” requirement for the specific jurisdiction test.

**C. Plaintiff has failed to plead a viable claim under Mass. Gen. Laws, ch. 93A.**

According to the Supreme Judicial Court of Massachusetts, a “private remedy is available” under Mass. Gen. Laws, Chapter 93A, Sec. 9 “only to a consumer, that is, a ‘person who purchases or leases goods or services or property, real or personal, primarily for personal, family or household purposes.’” *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 701 (Mass. 1975). The court went on to state that two things must be pled in order to state a claim: “First, there must be alleged an included transaction, i.e., a purchase or lease of goods, services, or real or personal property. Second, the included transaction must have been undertaken primarily for personal, family, or household purposes.” *Id.* Plaintiff cannot establish either requirement.

First, Plaintiff did not “purchase services for personal, family or household purposes.” He paid for breeding and boarding at an equine boarding facility. Second, the interactions between the parties demonstrate that Plaintiff is not a consumer within the meaning of the statute. The communications, even from very early on, indicate that Plaintiff considered the breeding of Mild Emotion to be a *business* rather than a personal endeavor. Communications from Plaintiff, attached hereto at Exhibit 4. Because his motives were not “primarily for

personal, family, or household purposes,” Defendant is not entitled to assert a claim under Sections 2 & 9 of Chapter 93A of the Massachusetts General Laws in this or any other lawsuit.

Clearly, the decision to board your horse at a farm and breed her multiple times in the hope of selling the foals for profit is not the type of “consumer transaction” that is intended to be protected by such laws.

#### IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request this Court to:

- 1) stay or dismiss this action because of the first-to-file rule.
- 2) dismiss this action under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction, as the overwhelming facts and authority demonstrate that Defendants lack sufficient contacts for this Court to assert either general or specific jurisdiction over it; and/or
- 3) dismiss this action under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim.

Respectfully submitted,

/s/Michael J. Mott  
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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing Memorandum was served electronically with the Clerk of the Court by using the CM/ECF system on this the 11<sup>th</sup> day of November, 2010 upon all parties of record.

/s/Michael J. Mott  
*Counsel for Defendants*